

IN THE  
INDIANA COURT OF APPEALS  
CASE NO. 82A01-0103-CV-111

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KIRIT C. SHAH, M.D.,	)	Permissive Interlocutory Appeal
	)	From the Vanderburgh Circuit Court
Appellant,	)	
(Defendant Below)	)	
	)	
vs.	)	Trial Court Cause No. 82C01-0007-CT-357
	)	
STAN HARRIS and NANCY HARRIS,	)	The Honorable Carl A. Heldt, Judge
	)	
Appellees,	)	
(Plaintiffs Below)	)	

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**BRIEF OF APPELLANT KIRIT C. SHAH, M.D.**

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### **III. Statement of Issues**

- A. Whether the Trial Court erroneously converted the applicable occurrence-based statute of limitations to a discovery-based statute of limitations.
- B. Whether the Trial Court erroneously applied the judicially-created exception to the statute of limitations first recognized in *Martin vs. Richey*, 711 N.E. 2d 1273, 1284-85 (Ind. 1999) and *Van Dusen vs. Stotts*, 712 N.E. 2d 491, 493 (Ind. 1999).
- C. Whether the Trial Court erroneously tolled the statute of limitations past the cessation of the physician-patient relationship.
- D. Whether the Trial Court erroneously failed to require Plaintiffs-Appellees to initiate their cause of action within the "reasonable period" required by Indiana Courts.

### **IV. Statement of Case**

This is a permissive appeal from an interlocutory order in a medical malpractice case.

In July of 1991, Dr. Shah diagnosed Stanley Harris with multiple sclerosis. (Appellant's App. P. 7, Complaint paragraph 4, hereinafter "Compl., ¶ \_\_".) Mr. Harris continued receiving medical care from Dr. Shah until 1993. (Appellant's App. P. 10, Admission Number 1.) On or about July 31, 1998, a different doctor diagnosed Mr. Harris as suffering from a vitamin B-12 deficiency, rather than multiple sclerosis. (Appellant's App. P. 7, Compl., ¶ 5.)

Mr. Harris and his wife initiated this cause of action against Dr. Shah on July 24, 2000, (Appellant's App. P. 7, Compl. ¶6), just one week shy of two years from the date of the vitamin B-12 deficiency diagnosis, and more than nine years after the multiple sclerosis diagnosis. A medical malpractice action in Indiana is governed by a two-year statute of limitations. Because Mr. and Mrs. Harris failed to bring their action against Dr. Shah within this two year period, Dr. Shah filed a motion for summary judgment. (Appellant's App. P. 14, Defendant's Motion for Summary Judgment.) The Trial Court denied the motion for summary judgment after oral arguments on

January 30, 2001. (Appellant's App. P. 3, Court's Entry for January 30, 2001.) The Trial Court, *sua sponte*, amended its entry on February 7, 2001. The amended entry states as follows:

The Court hereby amends its minute of 1/30/01 to read as follows: Plaintiffs by Glenn Deig; Deft. by A.J. Manion. Hearing held on Defendant's motion for summary judgment. Court finds that a material issue of fact exists with regard to when the Plaintiffs discovered the alleged malpractice and resulting injury or facts that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and resulting injury. Consequently, in accordance with *Van Dusen v. Stotts*, 712 N.E.2d 491 (Ind. 1999), the Plaintiffs may, indeed, have filed their complaint within two years after said discovery and therefore within the statute of limitations as set forth in *Van Dusen*. With that issue of fact undecided, the Defendant's motion for summary judgment is denied.

(Appellant's App. P. 6, Court's Entry for February 7, 2001.) On February 9, 2001, Dr. Shah requested the Trial Court certify its entry of February 7, 2001 for interlocutory appeal. (Appellant's App. P. 44, Petition to Certify). On February 15, 2001, that motion was granted. (Appellant's App. P. 46, Trial Court's Minute granting Petition to Certify For Interlocutory Appeal). Dr. Shah moved this Court for permission to bring this appeal pursuant to Rule 14(B) of the Indiana Rules of Appellate Procedure on February 28, 2001, and that motion was granted on April 2, 2001. Dr. Shah filed his Notice of Appeal with the Trial Court on April 16, 2001.

## **V. Statement of Facts**

Dr. Kirit C. Shah is a neurologist. (Appellant's App. P. 7, Compl. ¶ 2). At all relevant times, Dr. Shah was a qualified healthcare provider under Indiana's Medical Malpractice Act, (I.C. 34-18-1-1, *et seq.*) (Appellant's App. P. 7, Compl., ¶ 2.) From June 20, 1991, until April 12, 1993, Mr. Stanley Harris was under the care and treatment of Dr. Shah. (Appellant's App. P. 7, Compl., ¶ 3; Appellant's App. P. 10 Admission No. 1.) On or about July 11, 1991, Dr. Shah diagnosed Mr. Harris as having multiple sclerosis. (Appellant's App. P. 7, Compl., ¶ 4.) Mr. Harris was last seen

by Dr. Shah on April 12, 1993. (Appellant's App. P. 10, Admission No 1.) After Mr. Harris last saw Dr. Shah, Mr. Harris sought medical care from other physicians. (Appellant's App. PP. 10-11, Admission Nos. 2- 4.) On or about July 31, 1998, one of Mr. Harris' subsequent treating physicians diagnosed Mr. Harris as suffering from a vitamin B-12 deficiency, and not from multiple sclerosis. (Appellant's App. P. 7, Compl., ¶ 5.) Mr. and Mrs. Harris initiated this cause of action on July 24, 2000, claiming Dr. Shah's care and treatment of Mr. Harris, from June of 1991 to April of 1993, was negligent and below the applicable standard of care. (Appellant's App. P. 7, Compl., ¶ 6.)

## **VI. Summary of the Argument**

### **A. The Trial Court erroneously converted the applicable occurrence-based statute of limitations to a discovery-based statute of limitations.**

The statute of limitations requires that claims be filed within two years after the date of the alleged act, omission or neglect. I.C. § 34-18-7-1(b) (1998). The act, omission or neglect in this instance occurred, at the latest, April 12, 1993. Mr. and Mrs. Harris failed to file their complaint within two years of April 12, 1993, thus their claim was untimely. Rather than recognize the statute as occurrence-based, the Trial Court denied summary judgment holding there was an issue of fact whether Mr. and Mrs. Harris filed their claim within two years of discovery of the alleged malpractice. Harris' discovery is irrelevant under the occurrence-based statute of limitations, thus the Trial Court's ruling is erroneous.

### **B. The Trial Court erroneously applied the judicially-created exception to the statute of limitations recognized in *Martin vs. Richey*, 711 N.E. 2d 1273, 1284-85 (Ind. 1999) and *Van Dusen vs. Stotts*, 712 N.E. 2d 491, 493 (Ind. 1999).**

The Indiana Supreme Court has created an exception to the two year occurrence-based statute of limitations. *Martin vs. Richey*, 711 N.E. 2d 1273, 1284-85 (Ind. 1999) and *Van Dusen vs. Stotts*,

712 N.E. 2d 491, 493 (Ind. 1999). This exception was applied because the plaintiffs suffered from diseases with long latency periods and, therefore, their conditions were not known or could not be known through the exercise of reasonable diligence prior to the expiration of the statute of limitations. Contrary to the facts of *Martin vs. Richey* and *Van Dusen vs. Stotts*, Mr. Harris did not suffer from a disease with a long latency period. Rather, Mr. Harris originally presented to Dr. Shah with a manifest medical condition, and after he last saw Dr. Shah in 1993, he presented to several subsequent treating physicians with a manifest medical condition. Mr. Harris, therefore, cannot claim he was unaware of his condition such that the latency exception would apply.

**C. The Trial Court erroneously tolled the statute of limitations past the cessation of the physician-patient relationship.**

Even if the latency exception recognized in *Martin vs. Richey* and *Van Dusen vs. Stotts* is applicable to the present case, this exception should not toll the limitations period past the end of the physician-patient relationship. Other than the latency exception, there are only two other means to toll the medical malpractice statute of limitations: the continuing wrong doctrine and the doctrine of fraudulent concealment. Mr. and Mrs. Harris do not avail themselves of either doctrine, but it is relevant to note that Indiana Courts have refused to toll the limitations period under those doctrines past the end of the physician-patient relationship. This Court should follow the logic of those earlier decisions and refuse to toll the statute of limitations, pursuant to the latency exception, past the end of the physician-patient relationship.

**D. The Trial Court erroneously failed to require Plaintiffs-Appellees to initiate their cause of action within the "reasonable period" required by Indiana Courts.**

Indiana law requires that a medical malpractice plaintiff initiate his cause of action within two years from the date of the occurrence, except where certain tolling doctrines are utilized; and then, the plaintiff must bring his action within a reasonable period. Indiana Courts have rejected delays ranging from 14 months to 23 months as unreasonable. In this case, the alleged malpractice was "discovered" more than five years after the latest possible occurrence. Rather than proceed directly to Court, however, Mr. and Mrs. Harris waited 23¾ months before bringing their claim. As such, their delay was unreasonable as a matter of law and should be dismissed as time-barred.

**VII. Argument**

**A. The Trial Court erroneously converted the applicable occurrence-based statute of limitations to a discovery-based statute of limitations.**

Standard of Review

When reviewing a grant or denial of summary judgment, the standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. *Indiana University Medical Center vs. Logan*, 728 N.E. 2d 855, 858 (Ind. 2000).

Discussion

Indiana's medical malpractice statute of limitations requires that claims be filed within two years after the date of the alleged act, omission or neglect. I.C. § 34-18-7-1(b) (1998). This statute, by its terms, is an "occurrence" rather than "discovery" statute. *See Id.* Plaintiffs' Complaint claims the relevant "act, omission or neglect" occurred on July 11, 1991, (Appellant's App. P. 7, Compl.



¶ 4). Thus, the applicable statute of limitations ran on July 11, 1993. *See* I.C. § 34-18-7-1(b) (1998). Given that this action was commenced on July 24, 2000, it is seven years too late.

Despite the clear language of the governing statute and the undisputed date of the alleged malpractice, the Trial Court looked not to the date of the relevant "act, omission or neglect," I.C. § 34-18-7-1, but to the potential discovery of such act or omission. In its amended entry denying summary judgment, the Trial Court stated that a "material issue of fact exists with regard to when the plaintiffs *discovered* the alleged malpractice and resulting injury or facts that, in the exercise of reasonable diligence, should have led to the *discovery* of the alleged malpractice and resulting injury." (Appellant's App. P. 6, Amended Trial Court Entry, emphasis supplied.)

The governing statute of limitations is an occurrence-based statute. *See* I.C. § 34-18-7-1. Rather than employ the statute of limitations as occurrence-based, however, the Trial Court's holding hinges on the time of discovery. The Trial Court's ruling, therefore, is contrary to existing case law and should be reversed.

**B. The Trial Court erroneously applied the judicially-created exception to the applicable statute of limitations recognized in *Martin vs. Richey*, 711 N.E. 2d 1273, 1284-85 (Ind. 1999) and *Van Dusen vs. Stotts*, 712 N.E. 2d 491, 493 (Ind. 1999).**

#### Standard of Review

When reviewing a grant or denial of summary judgment, the standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. *Indiana University Medical Center vs. Logan*, 728 N.E. 2d 855, 858 (Ind. 2000).

## Discussion

The governing medical malpractice statute of limitations is an occurrence-based, rather than discovery-based, statute. I.C. § 34-18-7-1(b) (1998). The Indiana Supreme Court, however, has created an exception which was erroneously applied by the Trial Court in denying Dr. Shah's Motion for Summary Judgment. In *Martin vs. Richey*, 711 N.E. 2d 1273, 1284-85 (Ind. 1999) and *Van Dusen vs. Stotts*, 712 N.E. 2d 491, 493 (Ind. 1999), the Indiana Supreme Court ruled the medical malpractice statute of limitations was unconstitutional *as applied* where plaintiffs were barred from pursuing an otherwise valid malpractice claim before they knew of, or had reason to know of, that claim. This so-called "latency exception" cannot be applied to the Harris' action against Dr. Shah.

### **1. *Martin vs. Richey* and *Van Dusen vs. Stotts* are limited to diseases with long latency periods**

In *Martin*, the plaintiff, Melody Martin, first learned that she suffered from breast cancer approximately 30 months after Dr. Richey did a needle aspiration and told her she was fine. Despite the delinquent filing, the Court declined to dismiss Ms. Martin's claims because "the statute precludes [her] from pursuing a claim against her doctor because she has a disease which has a long latency period and which may not manifest significant pain or symptoms until several years after the asserted malpractice." *Martin, supra*, at 1279 (emphasis supplied). The Court alternatively held the statute of limitations was unconstitutional under Section 12 of the Indiana Constitution. The rationale was that because the statute required the plaintiff to file a claim before she was able to discover the alleged malpractice and her resulting injury, it imposed an impossible prerequisite on her access to the courts and pursuit of her tort remedy. *Id.*

In *Van Dusen*, a companion case to *Martin*, the plaintiff also suffered from a slow developing cancer. Similar to *Martin*, the plaintiff in *Van Dusen* suffered from a disease or condition with a long latency period and symptoms which did not surface until several years after the asserted malpractice. As such, the *Van Dusen* court held that in this case, the two-year statutory period begins to run when the plaintiff discovers facts which, in the existence of reasonable diligence, should lead to the discovery of the malpractice and resulting injury. 712 N.E. 2d at 495.

**2. Indiana Courts have applied the exception only where the patient's condition is not known, or cannot be known, to the patient**

Since the Supreme Court's decisions in *Martin* and *Van Dusen*, the latency exception has been applied in four cases. In three of those four cases, the plaintiff was unaware he or she was suffering from a disease until after the statute of limitations had run due to long latency periods. See *Harris vs. Raymond*, 715 N.E. 2d 388, 390 (Ind. 1999), *Weinberg vs. Bess*, 717 N.E. 2d 584 (Ind. 1999) and *Halbe vs. Weinberg*, 717 N.E. 2d 876 (Ind. 1999). The fourth application of the latency exception, *Ling v. Stillwell*, 732 N.E.2d 1270 (Ind.App. 2000), presents the extraordinary combination of death brought about by the criminal conduct of a nurse coupled with a Hospital's attempts to inhibit plaintiff's timely discovery of his cause of action. The case at bar bears little resemblance to either application of the latency exception.

In *Harris vs. Raymond*, 715 N.E. 2d 388, 390 (Ind. 1999), Dr. Harris, an orthodontist, inserted dental implants in Ms. Raymond's jaw but failed to warn her of certain defects after he received government safety alerts concerning the implant. The defective nature of the implants was known to plaintiff years later when she began to suffer the resulting symptoms. When she initiated her medical malpractice action outside the two year limitations period, the Court held that Ms.

Raymond, like Ms. Martin, was incapable of discovering that a defective product had been installed—and therefore malpractice had been committed—within the limitations period. The Court, therefore, applied the "latency exception" created in *Martin* and *Van Dusen* to deny a motion to dismiss.

*Weinberg vs. Bess*, 717 N.E. 2d 584 (Ind. 1999) and *Halbe vs. Weinberg*, 717 N.E. 2d 876 (Ind. 1999) present nearly identical applications of the latency exception. Ms. Halbe and Ms. Bess were both falsely informed that the breast implants Dr. Weinberg had surgically implanted contained little or no silicone. In neither case did Ms. Halbe or Ms. Bess learn of Dr. Weinberg's repeated deceptions until many years after their surgeries. In both cases, the Court ruled the "latency exception" was applicable because neither plaintiff suffered any resulting symptoms within the limitations period and therefore had no reason to commence a cause of action prior to the limitations period. "We see nothing in the record that would lead us to believe that, in the exercise of reasonable diligence, Bess should have had any reason whatsoever to suspect she had a cause of action against her doctor before [the limitations ran]." *Bess, supra*, at 590.

*Raymond*, *Bess*, and *Halbe* have no application to the present facts because, unlike the plaintiffs in these three cases, Mr. Harris did not suffer from a disease which he could not discover. To the contrary, Mr. Harris' symptoms were fully manifested and he was actively seeking medical treatment for his condition—for many years after the end of his relationship with Dr. Shah. As such, the latency exception as developed by *Raymond*, *Bess*, and *Halbe* should not be applied here.

The fourth application of the latency exception, *Ling vs. Stillwell*, 732 N.E.2d 1270 (Ind.App. 2000), arises from the macabre story of Orville Lynne Majors. Majors was a nurse at Vermillion County Hospital at the same time Doris Stillwell died as a patient of that Hospital on August 1,

1994. The decedent's family was told she died of natural causes. *Ling* at 1273. Doris Stillwell's death certificate reflected that she died of cardiac arrhythmia and coronary heart disease. *Id.* Due to the "epidemic level mortality rate" at the Hospital during this time, however, local law enforcement began a criminal investigation in March of 1995 which ultimately resulted in Majors' conviction for murder. *Ling* at 1273. It was not until July of 1997, however, that Doris Stillwell's family was informed that her death was a part of that investigation. *Id.* Mrs. Stillwell's son, as her representative, initiated a suit against the Hospital in September of 1997—just two months after he learned that Nurse Majors was involved in his mother's death. *Ling* at 1273-74. The Hospital moved for dismissal pursuant to the governing statute of limitations but the Court of Appeals allowed the claim to survive because, "[g]iven the facts and circumstances" of the case, Mr. Stillwell "could not have reasonably been expected to discover that his mother's death could have been the result of misconduct, medical malpractice, or negligence until after the limitations period had passed." *Id.* at 1275.

It is the extraordinary "facts and circumstances" of *Ling* which distance it from the case at bar. Doris Stillwell's death resulted not from natural causes but allegedly from the criminal conduct of Nurse Majors. The Hospital inhibited Mr. Stillwell from learning the cause of his mother's death, and only when details of the criminal investigation became public did Mr. Stillwell have cause to suspect he had a cause of action. Moreover, while Mr. Stillwell had suspicions about his mother's death prior the expiration of the statute of limitations, the Court of Appeals noted that Vermillion County Hospital had threatened to file suit against Mr. Stillwell's legal counsel if he filed a "frivolous claim" against the Hospital.

*Ling* does not present facts involving a disease with a long latency period delaying discovery of malpractice, as was the case in both *Martin* and *Van Dusen*. *Ling* does, however, present a clear analogy to such a latent disease and an extraordinary factual scenario on which no court of equity could turn its back. The facts in *Ling* are comparable to a disease with a long latency period because, similar to the breast cancer patient who is erroneously informed there is no condition to fear, Doris Stillwell's family was informed that she died from natural causes. The "natural" aspect of this misinformation best aligns with the latency exception because Mr. Stillwell had nothing to suspect. These facts, coupled with the basic notion that the Hospital's attempts to hamper Mr. Stillwell from learning the truth, could not be permitted to serve as a device to shield the Hospital from liability. Mr. Harris, alternatively, was forthrightly informed that he was currently suffering from a serious medical condition. Dr. Shah did not seek to mislead Mr. Harris nor did Dr. Shah cause other subsequent treating physicians to mislead Mr. Harris. Whether the latency exception was extended to *Ling* by analogy or the simple demand of equity, the facts in the present case do not warrant such a leap here.

**3. Indiana Courts have rejected the "latency exception" where the narrow conditions of *Martin vs. Richey* and *Van Dusen vs. Stotts* are not met**

*Martin*, *Van Dusen* and their progeny are founded upon the notion that the plaintiffs could not timely discover the alleged medical malpractice due to the long latency period of their respective conditions or because extraordinary circumstances delayed discovery. By their own holdings, the *Martin* and *Van Dusen* decisions were never meant to be the panacea for the ills of all untimely plaintiffs. The specific limitations of *Martin* and *Van Dusen* are best illustrated through a discussion of recent decisions where Indiana Courts have rejected application of the "latency exception."

The Indiana Supreme Court recently declined to apply its "latency exception" in *Boggs vs. Tri-State Radiology, Inc.*, 730 N.E. 2d 692 (Ind. 2000). Mrs. Boggs sought medical treatment in July 1991 after she detected a lump in her breast. 730 N.E. 2d at 694. A mammogram was taken and she was instructed to return after one year. *Id.* On July 28, 1992, a second mammogram was taken and, based on a comparison with the first, a biopsy was recommended. *Id.* On August 12, 1992, the biopsy revealed the lump in Mrs. Boggs' breast was malignant and that the cancer had metastasized to her liver. *Id.* Mrs. Boggs died on July 28, 1993, and her husband initiated a medical malpractice action on her behalf on July 1, 1994. *Boggs* at 694. Faced with a motion for summary judgment, the trial court ruled Boggs' claim untimely. 730 N.E. 2d at 694-95. The Indiana Court of Appeals applied the *Martin* and *Van Dusen* latency exception to reverse the trial court, but the Indiana Supreme Court, on transfer, overturned the Appellate Court and reinstated the judgment of the trial court. The Indiana Supreme Court held that because Mrs. Boggs became aware of her injury eleven months before the statute of limitations expired, the latency exception was inapplicable. *Boggs* at 698. The *Boggs* court further held the 22½ month delay between discovery and filing outside the limitations period was unreasonable as a matter of law. 730 N.E. 2d at 699 (*citing Cacdac vs. Hiland*, 561 N.E. 2d 758, 758 (Ind. 1990) (22-month delay); *Cyrus vs. Nero*, 546 N.E. 2d 328, 331 (Ind.App. 1989) (22-month delay); *Spoljaric vs. Pangan*, 466 N.E. 2d 37, 43044 (Ind.App. 1984) (14-month delay)).

The "latency exception" was again rejected in *Burton vs. Elskens*, 730 N.E. 2d 1281, 1283-84 (Ind.App. 2000). The plaintiff Burton suffered a stroke immediately after a craniotomy which was performed by Dr. Elskens on October 12, 1994. *Burton* at 1282. Dr. Elskens continued monitoring Burton's progress until May 23, 1995. *Id.* Burton initiated a medical malpractice action on May 19,

1997. *Id.* The Indiana Court of Appeals held the claim was barred by Indiana's two year statute of limitations. *Burton* at 1285. The Court rejected application of the "latency exception" articulated in *Martin vs. Richey* because:

[u]nlike the circumstances in *Martin*, Mrs. Burton did not suffer from a disease with a long latency period and her condition did 'not manifest significant pain or debilitating symptoms until several years after [an] initial diagnosis or misdiagnosis.' Nor do the circumstances [] dictate that Mrs. Burton's condition was one that the Burtons, in the exercise of reasonable diligence, could not have discovered within the two-year statute of limitations.

*Burton*, 730 N.E. 2d at 1285.

The "latency exception" was most recently rejected in *Coffer vs. Arndt*, 732 N.E. 2d 815, 817 (Ind.App. 2000)—a case involving a failure to diagnose. Mr. Coffer sued his former optometrist, Dr. Arndt, when a subsequent treating ophthalmologist concluded that Mr. Coffer suffered from glaucoma which had existed for several years. 732 N.E. 2d at 818. Mr. Coffer last saw Dr. Arndt in September or October of 1995. *Id.* Thereafter, Mr. Coffer was diagnosed as having glaucoma on December 19, 1995. *Id.* Mr. Coffer initiated his medical malpractice action on December 19, 1997. *Id.* The trial court summarily dismissed the Coffer complaint as untimely and, on appeal, the Indiana Court of Appeals affirmed, rejecting an application of the "latency exception." 732 N.E. 2d at 821. Similar to *Boggs*, Mr. Coffer had 22 months within which to bring his cause of action, but did not. The *Coffer* court held the applicable limitations period was constitutional as applied to Mr. Coffer and upheld the summary judgment. *Id.*



**4. The "latency exception" is not available to resurrect Harris' untimely claim**

The latency exception cannot save Mr. and Mrs. Harris from summary judgment because Mr. Harris did not suffer from a condition with a long latency period, nor did he face extraordinary circumstances which were out of his control and delayed his discovery of the alleged malpractice. Mr. Harris' symptoms appeared in 1991 and he sought treatment from a variety of physicians since he last saw Dr. Shah in 1993. *Martin, Van Dusen* and their progeny—*Raymond, Halbe, Bess and Ling*—uniformly deal with one simple concept: the manifestations of malpractice were hidden until it was too late. The plaintiffs in those cases either suffered from a disease or condition which was unknown to the patient or were otherwise actively prevented from discovering the alleged malpractice by forces beyond their control. By contrast, Mr. Harris knew he had a medical condition in 1991. Presumably this is why he went to Dr. Shah. Mr. Harris also knew he had a medical condition in 1993 when that physician-patient relationship ended, and he sought treatment from other health care providers. Unlike the plaintiffs in the *Martin* and *Van Dusen* line, Mr. Harris did not have the mistaken assumption there was nothing wrong. To the contrary, Mr. Harris had been informed that he suffered from a very serious debilitating disease for which he could, and did, seek second (and third) opinions. And, unlike the plaintiff in *Ling*, there were no extenuating circumstances which actively delayed the discovery of the alleged medical malpractice.

Tracking the language of the *Burton* court when it rejected the "latency exception": "[u]nlike the circumstances in *Martin*, [Harris] did not suffer from a disease with a long latency period and [his] condition did not manifest significant pain or debilitating symptoms until several years after [an] initial diagnosis or misdiagnosis.'" *Burton*, 730 N.E. 2d at 1285 quoting *Martin, supra*, at 1282.



to toll the limitations period beyond the physician-patient relationship where the patient claimed constructive fraudulent concealment. 730 N.E. 2d at 698.<sup>1</sup>

In this case, Mr. and Mrs. Harris make an extraordinary request: that this Court toll the limitations period for seven years after the conclusion of the physician-patient relationship. The latency exception does not create a situation any different than the physician-patient relationship seen in the continuing wrong doctrine or the fraudulent concealment doctrine. Thus, Mr. and Mrs. Harris cannot distinguish themselves from the victim of a continuing wrong or fraudulent concealment to gain the special concession of tolling past the physician-patient relationship.

The three available means to toll the limitations period share one common thread: tolling is appropriate because the patient did not know and could not have known the applicable limitations period was running. Courts dealing with terminated physician-patient relationships have declined to toll the limitations period beyond the relationship because the possibility of an act or omission which could give rise to the injury at issue ends with the physician-patient relationship. *See Boggs* at 698; *Coffer* at 821. Just as those courts have held that a treating physician is relieved of exposure after the passage of two years, so too this Court must uphold the intent of the legislature.

The Trial Court erroneously denied summary judgment when it tolled the limitations period past the conclusion of the physician-patient relationship. The undisputed facts reveal that Mr. Harris last saw Dr. Shah on, and sought treatment from others after, April 12, 1993. (Appellant's App. P.10-11.) The statute of limitations expired, therefore, at the latest, on April 12, 1995. The

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<sup>1</sup> Active fraudulent concealment tolls the limitations period until discovery. Neither the Complaint nor Harris' brief in opposition to summary judgment argues active fraudulent concealment is present in this case, thus it is not discussed here.

Complaint was filed on July 24, 2000, five years after the latest date to which the statute of limitations could be tolled.

**D. The Trial Court erroneously failed to require Plaintiffs-Appellees to initiate their cause of action within the "reasonable period" required by Indiana Courts.**

Standard of Review

When reviewing a grant or denial of summary judgment, the standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. *Indiana University Medical Center vs. Logan*, 728 N.E. 2d 855, 858 (Ind. 2000).

Discussion

Even if this Court accepts the Harris' arguments and applies the "latency exception", dismissal remains appropriate because Mr. and Mrs. Harris did not bring his cause of action within the "reasonable period" required by the Indiana Supreme Court.

A medical malpractice plaintiff in Indiana who discovers malpractice outside the otherwise applicable limitations period "does not have two full years in which to file a claim." *LeBrun vs. Conner*, 702 N.E. 2d 754, 757 (Ind.App. 1998). "Instead, the law requires the plaintiff to institute an action within a reasonable time after the alleged malpractice is deemed to have been discovered." *Id.* Plaintiffs who sit on their rights are disfavored by the law and unreasonable delays lead to dismissals. *See, e.g., Cacdac vs. Hiland*, 561 N.E. 2d 758, 758 (Ind. 1990) (22-month delay); *Cyrus vs. Nero*, 546 N.E. 2d 328, 331 (Ind.App. 1989) (22-month delay); *Spoljaric vs. Pangan*, 466 N.E. 2d 37, 43044 (Ind.App. 1984) (14-month delay)). Most recently, the Indiana Supreme Court, in

*Boggs*, held the 22 ½ month delay between discovery and filing outside the limitations period was unreasonable as a matter of law. 730 N.E. 2d at 699.

Conversely, in *Ling*, the Court of Appeals noted that the plaintiff waited only two months after "discovery" to file his complaint, but given the extraordinary situation, this delay was reasonable. *Ling*, 732 N.E.2d at 1275. Thus, *Ling* affirms that even a plaintiff whose "discovery" occurs outside the statute of limitations must file within a reasonable period of time.

To oppose summary judgment, Mr. and Mrs. Harris argued that *Boggs* is distinguishable because the plaintiff in *Boggs* discovered malpractice while 11 months remained in the limitations period whereas Mr. and Mrs. Harris did not know or could not have known of the alleged malpractice until after the expiration of the limitations period. They argue that this distinction allows 23¾ months *after* "discovery" to file their claim while the plaintiff in *Boggs* was not allowed 22½ months. The Harris' argument is misplaced because it runs counter to *Ling* which confirms that the filing must occur within a reasonable period of time after "discovery" even if the statute of limitations has already run, and because it creates a windfall for plaintiffs who "discover" malpractice after their limitations period expires.

The applicable limitations period is not a discovery-based statute. As such, the "full two years" for Mr. Harris ended, at the latest, in 1995. Assuming the latency exception is applied, the Harris claim is governed by the "reasonable period standard" which provides that: "After the plaintiff is deemed to have learned of the malpractice, [he] does not have two full years in which to file a claim." *LeBrun, surpa*, 702 N.E. 2d at 757. *See also, Ling*, 371 N.E.2d at 1275.

Harris' attempts to distinguish *Boggs* to avoid this "reasonable period" standard seeks inequity. The *Boggs* plaintiff discovered malpractice while she was dying of cancer eleven months

before her statute of limitations was to expire. The Indiana Supreme Court held, even while she was "fighting for her life," *Boggs* was not granted "a full two years" from discovery but only "a reasonable period" in which to file her claim—and 22½ months was not reasonable as a matter of law.

Harris differs from *Boggs* only in that he "discovered" the alleged malpractice outside the limitations period whereas *Boggs* discovered malpractice within the limitations period. Harris argues this distinction entitles him to the windfall of "a full two years" from discovery where *Boggs* was not allowed 22½ months from discovery. This is a distinction without a difference. The fact Harris "discovered" the alleged malpractice outside the statute of limitations should not afford him significantly greater latitude than any other "discovery" based plaintiff.

Even without the *Boggs* decision, however, the extent of the inequity sought by Harris is profound: Harris simply disregards the precedents of other plaintiffs stricken for shorter periods. *See, e.g., Cacadac vs. Hiland*, 561 N.E. 2d at 758 (22-month delay); *Cyrus vs. Nero*, 546 N.E. 2d at 331 (22-month delay); *Spoljaric vs. Pangan*, 466 N.E. 2d at 43-44 (14-month delay). The delay between Harris' discovery and the filing of their Complaint was unreasonable as a matter of law, thus the Trial Court erroneously failed to grant summary judgment.

### **VIII. Conclusion**

Mr. and Mrs. Harris initiated their cause of action more than nine years from the conduct alleged, more than seven years from the time his physician-patient relationship with Dr. Shah concluded and he began seeing other physicians, and more than 23¾ months after the alleged "discovery" through contravening diagnosis. The Trial Court erred when it denied summary judgment because: (1) the Trial Court erroneously converted the applicable occurrence-based statute of limitations to a discovery-based statute; (2) the Trial Court erroneously applied the judicially-

created exception to the applicable statute of limitations first recognized in *Martin vs. Richey*, 711 N.E. 2d 1273, 1284-85 (Ind. 1999) and *Van Dusen vs. Stotts*, 712 N.E. 2d 491, 493 (Ind. 1999); (3) the Trial Court erroneously tolled the statute of limitations past the cessation of the physician-patient relationship; and (4) the Trial Court erroneously failed to require Plaintiffs-Appellees to initiate their cause of action within the "reasonable period" required by Indiana Courts.

This Court should order that the Trial Court order summary judgment in favor of Dr. Shah and against Mr. and Mrs. Harris.

Respectfully submitted this 25<sup>th</sup> day of May, 2001.

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I certify that this brief contains less than 14,000 words.

**CERTIFICATE OF SERVICE**

I certify that I have caused a true and accurate copy of the foregoing Appellant's Brief and the Appellant's Appendix has been served upon the following by placing the same in the United States Mail, postage prepaid, this 25th day of May, 2001:

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